Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

JAMES ROBERT PELTIER,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 500 F. 2d 985.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266, articulated a new doctrine or simply reaffirmed well-established Fourth Amendment standards.

2. Whether Respondent who, like Almeida-Sanchez, challenged on constitutional grounds the validity of the search of his automobile throughout the District Court and Court of Appeals' proceedings, is to be afforded the same relief as that previously afforded in Almeida-Sanchez.

STATEMENT

Petitioner's statement of the case is substantially correct.

REASONS FOR DENYING THE WRIT

I. The manner in which the Court of Appeals disposed of the present case precludes effective review on the issue of whether this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266, should be applied retroactively. Although Petitioner asserts that the decision below is in direct conflict on the issue of retroactivity with the recent decision of the Court of Appeals for the Fifth Circuit in United States v. Miller, 492 F. 2d 37, a careful reading of the two opinions reveals that such is not the case.

Whereas in Miller the Fifth Circuit defined the issue at bar as "whether Almeida-Sanchez should be given retrospective application" (492 F. 2d at 40), a majority of the Court of Appeals in the present case found it unnecessary to consider the question of retroactivity for reasons discussed herein.

Petitioner's statement of the facts in Miller is substantially correct and need not be reiterated. (Pet., p. 9). The Fifth Circuit approached the issue of retroactivity by initially asserting that "Almeida-Sanchez announced a 'new rule' which invalidates searches conducted without probable cause anywhere but at the border or its functional equivalent." (492 F. 2d at 40-41). The decision fails to reveal any analysis of the question of what constitutes a "new rule", nor does it examine this Court's language in Almeida-Sanchez to ascertain whether in fact a new constitutional doctrine was articulated.

Following the Fifth Circuit's determination that Almeida-Sanchez announced a new legal principle, the Court proceeded to the question of whether the "new rule" was to be given retroactive effect in light of the criteria established by this Court in such cases as Desist v. United States, 394 U.S. 244, and Stovall v. Denno, 388 U.S. 293. Ultimately, Miller's conviction was affirmed as the Fifth Circuit concluded that Almeida-Sanchez "should be given only prospective application" (492 F.2d at 42).

Unlike the Fifth Circuit, the Court of Appeals in the present case found it unnecessary to consider whether Almeida-Sanchez should be applied retroactively. The Court properly recognized that "for the doctrine of retroactivity to be relevant at all, the [Supreme] Court must have articulated a new doctrine." (Pet. App. A, p. 3a). Support for this contention is found in a recent decision of this Court in which it was stated that, "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." Milton v. Wainwright, 407 U.S. 371, 381-82, n. 2 (1972) (dissenting opinion of Mr. Justice Stewart) (citations omitted).

The Court below then turned to the question of whether Almeida-Sanchez did, in fact, represent the announcement of a "new rule" by this Court. Relying upon Mr. Justice Stewart's assertion in Almeida-Sanchez that "neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case," (413 U.S. at 272), the Court of Appeals concluded that this Court "was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in Almeida-Sanchez, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court" (Pet. App. A, p. 9a).

The Petition for a Writ of Certiorari should be denied inasmuch as the Court of Appeals in Peltier did not reach the issue of whether Almeida-

Sanchez should be applied retroactively. This Court has repeatedly asserted that only under rare circumstances will it consider questions not decided by the Court below.

> "This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here." (Blair v. Oesterlein Machine Co., 275 U.S. 220, 225).

Assuming that this Court were to accept the Peltier case for review and determine that the rule announced in Almeida-Sanchez constitutes a new legal doctrine, the failure of the Court below to consider the substantive question of retroactivity might preclude this Court from addressing itself to that issue.

II. The decision below is in full accord with principles expressed in decisions of this Court. The Court of Appeals acknowledged, correctly in our view, that the issue of retroactivity arises only when this Court enunciates a new legal doctrine. (Pet. App. A., p. 3a).

Significantly, there is no language in Almeida-Sanchez which supports Petitioner's claim that the decision announced a new rule. Following a careful review of prior automobile search cases and administrative inspection cases, Mr. Justice Stewart concluded that neither line of authority provided "any support for the constitutionality of the stop and search in the present case." 413 U.S. at 272. This Court announced that its decision was controlled by Mr. Justice Taft's opinion in Carroll v. United States, 267 U.S. 132 in which it was established that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U.S. at 153-54.

Such language lends strong support to the Court of Appeals' holding in Peltier that Almeida-Sanchez neither overruled earlier decision of this

Court nor disturbed long accepted and widely relied upon practice. Rather, Almeida-Sanchez "reaffirmed well-established Fourth Amendment standards dating back to Weeks v. United States, 232 U.S. 383 (1914), and Carroll v. United States, 267 U.S. 132 (1925)" (Pet. App. A., p. 6a).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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